

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2293

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES G. MARTIN,

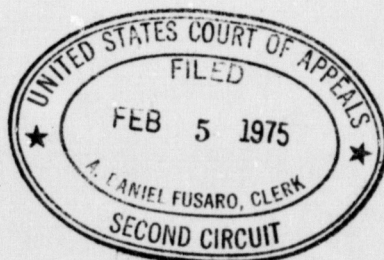
Appellant.

B
P/S
Docket No. 74-2293

Docket No. 74-2524

APPENDIX

ON CONSOLIDATED APPEALS FROM
AN ORDER AND JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
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Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

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PAGINATION AS IN ORIGINAL COPY

[illegible]

(03)	ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED					
				DATE	NAME	RECEIVED		DISBURSED	
	Fine,								
	Clerk,								
	Marshal, JB ✓								
	Attorney,								
	X Commissioner's Clerk 26								
	X Witnesses , 7201								
	Income tax evasion.								
	(Two Counts)								

DATE	PROCEEDINGS
2-25-74	Filed indictment.
3-11-74	Deft. (atty. present) Pleads not guilty. Bail fixed at \$5,000. P.R.B. unsec. Bail limits extended to EDNY. Motions returnable in 10 days. Case assigned to Judge Owen for all purposes. Pollack, J.
3-11-74	Filed Deft's P.R.B. without security in the sum of \$5,000..
9-23-74	Jury selected & sworn-Trial begun, Reporter Jack Greenberg.
9-24-74	Trial continued-Reporter Mike Michaelini.
9-25-74	Trial continued & adjourned until 9-27-74.
9-27-74	Trial continued.
	-over-

DATE	PROCEEDINGS
9-30-74	Trial continued-For deft's. refusal to answer certain questions while under oath Court holds deft. in criminal contempt. Deft. is given 6 mos. in prison to begin upon conclusion of trial.
10-1-74	Time 11:30 A.M.-Verdict received-Guilty on both counts-Sentence date set for Nov. 1st at 2:15. Bail continued until surrender on Oct. 4th at 10:00 A.M. in U.S. Marshal's Office to begin 6 mos. sentence on above criminal contempt. Pre-Sentence Investigation Ordered.....Owen,J.
10-2-74	Filed notice of appeal from the final judgment of 10-1-74 and ORDER of the Court. Leave granted to proceed in forma pauperis.....Owen,J. Mailed notice to James G.Martin 3929 Carpenter Ave.Bronx,N.Y. and U.S. Attorney's Office.
10-3-74	Filed Unsecured Personal Recognizance Bond pending appeal in the sum of \$5,000...Clerk.
10-21-74	Filed notice of certification and transmittal of the record on appeal to the U.S.C.A.
10-23-74	Filed ORDER-Upon finding deft's. conduct in violation of 18 U.S.C. Sec.401(3), it is Ordered and adjudged that deft be imprisoned for a period of six months, said sentence to begin October 4, 1974, at 10:30 a.m. unless stayed by the Court of Appeals.....Owen,J.
10-21-74	Filed transcript of record of proceedings dated 9-30-74 & 10-1-74.
10-21-74	Filed transcript of record of proceedings dated 9-27 thru 9-30-74.
11-15-74	Filed JUDGMENT and COMMITMENT (atty present) It is adjudged that the deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE(1)YEAR and ONE(1) DAY on each of counts 1 and 2, to run concurrently with each other. Bail is Continued pending appeal....Owen,J. Issued commitment 11-18-74.
11-15-74	Filed deft's. notice of appeal from the Judgment of Judge Owen as entered on 11-15-74. Mailed copies to James G. Martin, 3929 Carpenter Ave.Bronx,N.Y. 10466 and U.S. Attorney's Office.
11-22-74	Filed SUPPLEMENTAL MEMORANDUM amending Order ^{to vacate contempt sentence.} dated 11-15-74, as indicated.....Owen,J. (mailed notice).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

JAMES G. MARTIN,

Defendant.
-----X

74 CRIM. 197

: INDICTMENT

: 74 Cr.

:
: S. D. OF N. Y.
: FEB 25 1974

The Grand Jury charges:

On or about the 15th day of April, 1968, in the Southern District of New York, JAMES G. MARTIN, the defendant, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by himself and his wife, Muriel V. Martin, to the United States of America for the calendar year 1967, by preparing and causing to be prepared, signing and causing to be signed and filing and causing to be filed with the Internal Revenue Service, a false and fraudulent income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for the said calendar year was \$4,286.22 and that the income tax due and owing thereon was \$674.38, whereas the defendant then and there well knew that their taxable income for the said calendar year was approximately \$18,766.05, upon which said taxable income there was due and owing to the United States of America an income tax of approximately \$4,034.49.

(Title 26, United States Code, Section 7201).

MICROFILM
FEB 25 1974

The Grand Jury further charges:

On or about the 15th day of April, 1969, in the Southern District of New York, JAMES G. MARTIN, the defendant, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by himself and his wife, Muriel V. Martin, to the United States of America for the calendar year 1968, by preparing and causing to be prepared, signing and causing to be signed and filing and causing to be filed with the Internal Revenue Service, a false and fraudulent income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for the said calendar year was \$6,035.80 and that the income tax due and owing thereon was \$1,006.80, whereas the defendant then and there well knew that their taxable income for the said calendar year was approximately \$15,100.08 upon which said taxable income there was due and owing to the United States of America an income tax of approximately \$3,262.65.

(Title 26, United States Code, Section 7201).

Stumm
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

74 CRIM. 197

Form No. 100-533-274 (Ed. 4-26-73)

JUDGE OWEN
United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

JAMES G. MARTIN,

Defendant.

INDICTMENT

26 U.S.C. § 7201

PAUL J. CURRAN

United States Attorney.

A TRUE BILL

Foreman.

FILED-533-274-2031-6350

DISTRICT COURT

FEB 25 1974

MAR 11-74 - Deft Present (Att. L. Greenberg) Plea Not Guilty
Assign to J. Owen today for motion
Bail fixed at \$5000 P.R. Bond secured. Bail
Limit to cover Eastern District of New York
40 Postlock. J.

APT. JAIL
GREENBERG

SEP 23 1974 - JURY SELECTED & SWORN - TRIAL BEGINS

APT. MIKE
MICHAELINI

SEP 24 1974 - TRIAL CONTINUED

SEP 25 1974 - TRIAL CONTINUED & PDS UNTIL 9/27/74.

SEP 27 1974 - TRIAL CONT'D.

SEP 30 1974 - TRIAL CONT'D. - DEF. REQUESTED TO HAVE CERTAIN
POSITION WHILE UNDER ORAL COURT HOURS DEF. IN CRIM. COURT
DEF. IS GIVEN 6 MOS. IN PRISON TO BEIN OPEN CONCLUSIVE
OF TRIAL.

APT. MIKE
MICHAELINI

OCT 1 1974 - TIME 11:30 A.M. - VERDICT RECEIVED -

1 GUILTY ON BOTH COUNTS -

Sentence 1800 for NOV. 1st at 2nd. Bail CONT'D.

UNTIL SURRENDER ON OCT 4th AT 10:00 A.M. IN U.S. MARSHAL
OFFICE TO BEGIN 6 mos. sentence on above crime. Contempt.
P.S. I. ORDERED.

OWEN, J.

APT. BLADIT

NOV 15, 1974 - DEF. Present for sentence. Whiskey consumption.
GIVEN 1 YR. & 1 DAY ON EACH OF COUNTS 1 & 2 TO RUN
CONCURRENTLY WITH IN-OTHER. BAIL CONT'D. FROM DEF.

OWEN, J.

1 cam:mg 3

2 THE CHARGE OF THE COURT

3 J. Owen

4 THE COURT: Now, ladies and gentlemen of the
5 jury, we have reached the point in this trial where you are
6 about to enter upon your final functions as jurors, and
7 in doing this, you will be performing one of the most
8 sacred obligations of citizenship, as I briefly outlined
9 to you when you were selected; that is, that you are going
10 to be acting here as ministers of justice.

11 You are to approach your duties in an attitude
12 of complete fairness and impartiality, appraise the evi-
13 dence calmly and deliberately, as was emphasized by me
14 when you were selected as jurors.

15 You must do this without the slightest trace of
16 sympathy, bias or prejudice for or against the Government
17 or the defendant as parties to this controversy.

18 Let me add that the fact that the Government is
19 a party and that the prosecution is brought in the name
20 of the United States of America entitles it to no greater
21 consideration than that accorded to any other party to
22 any litigation.

23 And by the same token, it is entitled to no
24 less consideration. All parties, whether it be the
25 Government, individual, or a corporation, or anyone else

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2 stands as equals before the bar of justice.

3 Up to now, your duty has been, and I have observed
4 you performing it admirably, your duty has been to listen
5 to the testimony and follow the evidence.

6 And I have noticed, and I am sure counsel has
7 been aware, that although a great deal of evidence and
8 testimony has been taken, most of it of a detailed nature,
9 you have been attentive and had a good grasp of the facts
10 and are fully equipped to carry out your final function.

11 Incidentally, despite the mass of documentary
12 evidence and the detail, I believe that the issues that you
13 are being called upon to decide are fairly simple.

14 Thus, your final role as outlined to you at the
15 time you were selected is to pass upon and decide the fact
16 issues.

17 What happened here? You are the sole and ex-
18 clusive judges of those facts. You pass upon the weight
19 of the evidence, you determine the credibility or believ-
20 ability of the witnesses. You resolve such conflicts as
21 you may find there is in the evidence and you may draw
22 such inferences as may be warranted by the facts as you
23 find them.

24 I shall later refer to how you may determine
25 the credibility of witnesses.

Now my function at this point is to instruct you as to the law. It is your duty to accept the law as I state it to you in these instructions.

With respect to any fact matter, it is your recollection and your recollection alone that governs. Anything that counsel may have said, either counsel for the Government or for the defense, that they may have said with respect to matters in evidence whether during the trial, in questions, in argument or in summation, is not to be substituted for your own recollection of the evidence.

So, too, anything that I may have said during the trial or may refer to during the course of these instructions as to any matter in evidence is not to be taken in lieu of your own recollection of that evidence.

I may say at this point that there are numerous exhibits which have been marked in evidence and as to those that are in evidence, it is your right to ask that they be made available to you, and they will be.

Now, the overruling or sustaining of objections, whether those were made by defense counsel or government counsel, is not to be considered by you in any respect.

These attorneys have the right, and indeed the duty, on the offer of any evidence to press whatever legal

1 cam:mg 6

2 objections they may believe exist to its admission. And
3 they are performing, therefore, a duty upon behalf of their
4 respective clients in so doing. And no inference is to be
5 drawn in any respect therefrom.

6 Whenever I struck testimony out, the reason for
7 doing it was a matter of law and that should not concern
8 you in any way, and the testimony that I struck out should
9 be disregarded and ignored by you and not considered in
10 any manner.

11 At various times during this trial, the attorneys
12 have had what we call a side bar conference and we have
13 gathered over here at the other side of the bench.

14 These also relate to matters of law and are matters
15 which do not concern you so that these conferences or their
16 purpose or anything you may think about them should not and
17 must not enter into your consideration in any way.

18 Now, the defendant James Martin is on trial here
19 under an indictment containing two counts, or two separate
20 charges of violations of a federal law which make it a
21 criminal offense for one to wilfully attempt to evade or
22 defeat a tax due to the Government. In this case, it is
23 income taxes.

24 We have count 1 which concerns his individual
25 income taxes for 1967; count 2 for the calendar year 1968.

1 cam:mg 7
2 A preliminary word to you for a moment as to what
3 this case is, however, not about.

4 While the Government contends that the alleged
5 unreported income here was the fruit of an embezzlement,
6 Mr. Martin is not on trial on a charge of embezzlement.
7 Nor is this case a matter of the collection of any taxes
8 that may be due to the Government.

9 This is a criminal case charging attempt to de-
10 feat or evade the payment of taxes due. That is the ex-
11 tent of it.

12 There is a distinction between civil liability
13 imposed upon the defendant and criminal responsibility for
14 his acts and conduct.

15 Therefore, we are not concerned with civil
16 liability, whether or not taxes claimed to be due have
17 been paid or will be paid. This will not be determined
18 by you in deciding the facts in your deliberations on this
19 case.

20 Now, before considering what the Government must
21 prove to sustain the charges, I want to repeat for you
22 certain principles of law which apply in every criminal
23 case to which I made reference when you were selected as
24 jurors.

25 First, the indictment is merely an accusation, a

1 camPlg 8

2 charge, as I colloquially put it. It is nothing more than
3 a piece of paper containing a statement of the charge. It
4 is no evidence whatsoever and no proof of the defendant's
5 guilt.

6 Mr. Martin has pleaded not guilty. That puts the
7 burden upon the Government of proving the charges against
8 him beyond a reasonable doubt.

9 Mr. Martin does not have to prove his innocence.
10 On the contrary, he is presumed to be innocent of the ac-
11 cusations contained in this indictment.

12 As I told you at the beginning of the trial,
13 presumption of innocence was in his favor then, it has been
14 present during the entire course of the trial, and the pre-
15 sumption of innocence continues in his favor during the
16 course of your deliberations in the jury room.

17 It is removed only if and only when you, the mem-
18 bers of the jury, are satisfied of his guilt beyond a
19 reasonable doubt.

20 Now, the question that then comes up is, what is
21 a reasonable doubt? The words almost define themselves,
22 that there is a doubt founded in reason, either arising out of
23 the evidence in a case or out of the lack of evidence as
24 the case may be.

25 It means a doubt which a reasonable person has

after carefully weighing all the evidence.

Reasonable doubt is a doubt which appeals to your reason, to your judgment, to your common sense and to your experience.

It is not caprice or whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendant, then you do not have an abiding conviction of the defendant's guilt which amounts to a moral certainty. In sum, if you have such a doubt which would cause you to hesitate before acting in matters of importance to yourself, then you have a reasonable doubt, and it is your duty to acquit.

On the other hand, if after such an impartial and fair consideration of all the evidence in the case, you can candidly and honestly say that you do have an abiding conviction of the defendant's guilt which amounts to a moral certainty, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt.

And under such circumstances, it is your duty

1 cam:mg 10

2 to convict.

3 One final word. A reasonable doubt does not
4 mean a positive certainty, or beyond all possible doubt.
5 If that were the rule, few men, however guilty they might
6 be, would be convicted. It is practically impossible for
7 a person to be absolutely and completely convinced of any
8 controverted fact which by its nature is not susceptible
9 of mathematical certainty.

10 In consequence, the law in a criminal case states
11 that it is sufficient if the guilt of a defendant is es-
12 tablished beyond a reasonable doubt, not beyond all possible
13 doubt.

14 Now, with those general instructions in mind, let
15 us turn to the charges against Mr. Martin.

16 The two counts of the indictment are based upon
17 the Internal Revenue laws, and those in pertinent part pro-
18 vide, and I am quoting: Any person who wilfully attempts
19 in any manner to evade or defeat any tax imposed by this
20 title, or the payment thereof"...then it goes on to say, "is
21 guilty of a crime."

22 An attempt to evade income taxes for any one year
23 is a separate offense from an attempt to evade the tax
24 for any other year. In substance, the indictment charges
25 that the defendant, by filing false and fraudulent returns,

1 cam:mg 11

2 wilfully attempted to evade or defeat a large part of the
3 taxes due on his and his wife's income for each of the
4 calendar years 1967 and 1968.

5 The charge which I want to read to you, so you
6 have it firmly in mind, is as follows:

7 Count 1. On or about the 15th day of April
8 1968, in the Southern District of New York, James G. Martin,
9 the defendant, unlawfully, wilfully and knowingly did at-
10 tempt to evade and defeat a large part of the income taxes
11 due and owing by himself and his wife Muriel B. Martin to
12 the United States of America for the calendar year 1967,
13 by preparing and causing to be prepared, signing and caus-
14 ing to be signed, and filing and causing to be filed with
15 the Internal Revenue Service a false and fraudulent income
16 tax return on behalf of himself and his wife, wherein it
17 was stated that their taxable income for the said calendar
18 year was \$4,286.22 and that the income tax due and owing
19 thereon was \$674.38; whereas the defendant then and there
20 well knew that their taxable income for the said calendar
21 year was approximately \$18,766.05, upon which the said
22 taxable income there was due and owing to the United States
23 of America an income tax of approximately \$4,034.49.

24 Now, the second count, which I will not read in
25 its entirety because the language is identical, charges

1 that the taxable income for the said year, -- this is the
2 calendar year 1968 -- on the return that was to be filed
3 the 15th day of April 1969, that the taxable income for
4 that year in the return was \$6,035.80 and the income tax
5 stated to be due and owing in the return was \$1,006.80,
6 whereas the defendant then and there well knew their taxable
7 income for the said calendar year was approximately \$15,100.08
8 upon which said taxable income there due and owing to the
9 United States of America, an income tax of approximately
10 \$3,362.85.
11

12 Those are the charges.

13 The charges center, as we are all aware, from
14 the testimony about the Government's contention that the
15 defendant wrongfully took for his own personal use and bene-
16 fit moneys of his employer which moneys he failed to in-
17 clude in the returns, thereby understating income to that
18 extent.

19 In this connection, I charge you that income de-
20 rived from illegal gains, profits or by embezzlement, if
21 you find there was such, is reportable and taxable just the
22 same as lawfully received income.

23 What must the Government establish to sustain
24 its charges with respect to each count? That is for each
25 of the years 1967 and 1968?

It must be bestablished beyond a reasonable doubt each of the following essential elements:

1. That the defendant received substantial taxable income in addition to that reported in the return for the year in question upon which unreported income additional federal income tax was due and owing.

2. That the defendant made an attempt to evade or defeat the tax and,

3. that he did so wilfully.

Those are the three elements.

I will say more in detail about them in a few minutes.

Accordingly, before we consider in any detail the elements of the offense, a word about the nature of evidence.

The law recognizes two types of evidence; one is direct, one is circumstantial.

Direct evidence is where a person testifies to what he himself saw or heard, that which he has knowledge of by virtue of his senses.

Circumstantial evidence is where proof is given to facts and circumstances from which in terms of common experience one may reasonably infer to ultimate facts sought to be established.

Such evidence, circumstantial evidence, if

believed, is of no less value than direct evidence. For in either case the essential elements of the crime charged must be established beyond a reasonable doubt.

Let me give you what judges have used for years as a homely example on circumstantial evidence.

Let's assume you come into the courtroom after lunch. We have a day like this outside. You come in and the sun is shining and the blinds are drawn. After you have been here a half hour, the door opens and a person comes in, shaking drops of water off a raincoat. Another person comes in with an umbrella and shakes the drops of water off the umbrella and stands it in the corner.

That would be circumstantial evidence from which you would be entitled to conclude that since the time you came into the building, it started to rain.

That is what we mean by circumstantial evidence.

Now the Government in this case relies upon both direct and circumstantial evidence to sustain its burden of proof, to prove, as the Government contends, that the defendant obtained substantial additional moneys over and above his salary in an improper fashion from his employer which he knowingly and wilfully failed to report in his returns for 1967 and 1968.

In this connection, the Government has proffered

certain testimony as part of its case, both in the field of handwriting and finance.

There are in evidence certain charts. These charts I want to instruct you are received only as an aid for you and your fact determination must be based solely upon the underlying exhibits in the case, the testimony of the witnesses and the totality of the evidence.

I am sure you understand that if you find that the charts do not reflect facts and figures as shown by the evidence in the case or the computations based thereon are inaccurate, then you shall disregard these charts entirely.

Now, the defendant contends that he succeeded to a cover-up of the shortages, that antedated his tenure, that they existed before he came on the job. And that while he continued this cover-up while he was the head of finance, and signed most of the unreported checks to that end, defendant contends that he did not personally receive one red cent from this and that his tax returns were a truthful statement of his income.

Counsel for each side has argued his respective contentions to you with respect to this and other matters at length, and I am not going to review the evidence on

1
2 this aspect of the case because I think it would be need-
3 lessly repetitious.

4 Enough to say that if the Government has failed
5 to satisfy you beyond a reasonable doubt that the defend-
6 ant personally got substantial moneys from these unreport-
7 ed checks, then that would end the case.

8 It would be your duty to acquit at that point.

9 On the other hand, if you are satisfied beyond
10 a reasonable doubt that the Government has sustained its
11 burden of proof that the defendant had substantial unre-
12 ported income upon which substantial taxes were due, you
13 then proceed to the next element.

14 May I say, incidentally, if you find that the
15 amount of the additional unreported income, or the additional
16 tax claimed to be due does not exactly tally with the
17 figure specified in the indictment, that does not matter
18 so long as you find it was substantial.

19 Now the second element, as I said to you earlier,
20 is that there must be an attempt to evade or defeat the
21 tax.

22 The attempt may consist of the failure to re-
23 port the full income required by law.

24 The attempt alleged in this indictment is the
25 filing of a false and fraudulent return for each of the

two years, which returns failed, it is charged, to include in each instance, the full taxable income of the taxpayer.

An attempt is made when the false return is knowingly filed.

To sustain the charge that the defendant filed a false and fraudulent tax return, you must be satisfied that he knew that he had income that was taxable and which he knew it was his duty to report in the returns, and that he attempted to evade or defeat payment of the tax due thereon or a substantial part thereof by knowingly and wilfully failing to state in the return all of the taxable income of his during the year in question.

Now we come to the third element; whether Mr. Martin's failure to report additional taxable income in the years in question, if you do so find, was wilful. Even if you should find that he understated his income in the returns, but that he did not do so wilfully with intent to evade taxes, then you must acquit him.

I repeat again that the only charge we have here is the evasion of taxes. The Government must establish beyond a reasonable doubt on this heading also that the defendant acted with a specific intent of defeating the true taxes known by him to be due.

Wilful means that one does and act purposely and with a specific intent to disregard the law or to do that which the law forbids. It involves conscious wrongdoing or as has sometimes been stated, a criminal intent and a purpose to vilate the law in the context of this case to cheat the Government out of any part of the taxes known by the defendant to be due it.

Actual knowledge that returns filed were false or contained a false statement and subsequent filing in spite of such knowledge could be the basis for a finding by you that the defendant was acting wilfully.

On the other hand, wilfully does not mean inadvertence, carelessness or honest misunderstanding of what the law requires. That is not wilfulness. There is no wilfulness in errors of law, mistakes of fact or bad judgment.

Wilfulness, or the state of a man's mind, one often tells jurors, is an issue of fact just as much as the state of a man's digestion.

Incidentally, at this point it is appropriate to mention that certain tax returns were admitted in evidence for earlier years than those charged in the indictment. Those are only in evidence, ladies and gentlemen, for you to consider on the defendant's state of mind. No

1
2 other purpose. They are there to be considered to the
3 extent they reflect upon the wilfulness or lack of it or
4 the defendant's intent in this case as you so find.

5 Now a little bit further on that. Wilfulness
6 is an issue you are called upon to decide as the trier
7 of the fact, but medical science has not yet devised an
8 instrument that can record what is in a person's mind in
9 the past or what motivated him at the time. So the
10 state of a man's mind may be inferred from his words, his
11 actions and his conduct.

12 Thus, direct proof of wilfulness is not re-
13 quired. It would be a rare case where it could be
14 shown that a taxpayer had stated or written down that he
15 was doing certain things with the specific object of de-
16 feating or evading the payment of income tax.

17 Accordingly, you may consider circumstantial
18 evidence on this point. And you may consider all of the
19 facts and all of the circumstances established by the evi-
20 dence together with the exhibits in determining whether
21 you conclude that there was wilfulness or not.

22 I point out that wilful intent may be inferred
23 from conduct, such as making false entries in a book or
24 avoiding the making of an entry, covering up sources of
25 income, destruction or withholding of books and records,

avoiding making the records usually in transactions of the kind or any conduct, the likely effect of which would be to mislead or conceal the true facts as to one's income.

If the tax evasion motive plays any part in such conduct, willfulness may be found even though such conduct may also have served some other purpose.

So to sum it up, in considering each count separately, you must find beyond a reasonable doubt, before you can convict, (1) that there was a substantial amount of federal income tax due and owing from the defendant; (2) that the defendant attempted to evade that tax, and (3), that the defendant acted wilfully.

As I said before, you must do this for each of the two years charged.

If you do not find all these three elements beyond a reasonable doubt as to Mr. Martin on a particular count, then you must acquit him on that count.

If, on the other hand, you find all of the elements beyond a reasonable doubt as to him on a particular count, then you should return a verdict of guilty as to him on that particular count.

As I said earlier, I will repeat, I am not making any attempt here to array all of the evidence for you particularly because you followed it carefully and

because counsel have gone into it extensively in summations.

The fact that I have not attempted to review the testimony of all the witnesses or my failure to comment on any part of the evidence is no indication that these have been disregarded by me or that I am placing special emphasis on any testimony that I have called to your attention in this charge.

You, of course, must consider all of the testimony and all of the exhibits. They are all important.

You may not assume and shall not assume, and I do not have any view as to the credibility of the witnesses or how the issues are to be decided. That is solely your function as triers of the fact.

Obviously determining the various questions you are called upon to decide, you will have to pass upon the credibility of witnesses.

How do you determine where the truth lies?

As I mentioned, I may have mentioned to you at the start of the trial, it is important for you not only to listen but to look at and observe the witnesses as they testify.

Your determination of the credibility of a witness depends very largely on the impression that he or she made upon you as to whether or not he or she was giving

an accurate version of what occurred.

I often say to jurors, and I believe I did to you, that when you walk into this courtroom and sit in the jury box, and while you are deliberating, you have your common sense with you, your good judgment, and your experience.

The degree of credibility to be given a witness should be determined by his demeanor, his or her relationship to the controversy or the parties, his or her bias or impartiality, the reasonableness of his or her statements, the strength or weakness of recollection viewed in light of all the other testimony, and all the other attendant circumstances in the case.

How did the witness impress you? Did he or her version appear straightforward or candid or was there an attempt to hide some of the facts? Was there a motive to testify falsely?

In other words, what you try to do is to size up a person just as you would in any important matter when you are trying to determine whether or not a person is truthful, candid and straightforward.

And the ultimate question for you to decide in passing on credibility is did the witness tell the truth before you?

1
2 It is for you and you alone to say whether the
3 testimony of any witness at this trial is truthful in
4 whole or in part. And in the light of demeanor or ex-
5 planations and all the evidence in the case.

6 The fact that a certain number of witnesses were
7 Government employees does not entitle their testimony to
8 be given greater weight or consideration than that accord-
9 ed any other witness.

10 In appraising the credibility of all witnesses,
11 you take into account the interest of the witness, the
12 motives and other factors that may be reasonably consid-
13 ered to influence or color a person's testimony.

14 If you find that any witness-- and this applies
15 to all witnesses-- if you find that any witness has tes-
16 tified falsely to any material fact, you may reject all
17 of the testimony of that witness or you may accept such
18 part or portion as commends itself to your belief as
19 credible and believable or which you may find is corrobo-
20 rated by other independent evidence in the case.

21 Expert witnesses here with respect to a hand-
22 writing expert and experts in finances have testified
23 as to opinions. They give their testimony based upon
24 professional experience and judgment.

25 Your determination as to whether to accept an

1
2 expert's testimony as credible is governed by the same
3 factors which you take into account in deciding whether
4 or not a version given by an ordinary lay witness of an
5 incident or occurrence is credible and believable and
6 should be accepted.

7 Now the law permits but does not require the
8 defendant to testify on his own behalf. Obviously a
9 defendant has a deep personal interest as a result of his
10 prosecution, indeed it is fair to say he has the greatest
11 interest in its outcome.

12 Interest creates a motive for false testimony
13 and a defendant's interest in the result of his trial is of
14 a character possessed by no other witness.

15 In appraising his credibility, you may take
16 that fact into consideration.

17 However, I want to say this with equal force to
18 you -- however, it by no means follows that simply because
19 a person has a vital interest in the end result, that he
20 is not capable of telling a truthful and straightforward
21 story.

22 It is for you to decide to what extent, if at
23 all, defendant's interest has affected or colored his
24 testimony.

25 Now, if you find that the defendant, when

1 questioned by anyone-- and I say if you find this-- if
2 you find that defendant, when questioned by anyone, gave a
3 false statement in an attempt to exculpate or exonerate
4 himself, you may consider this as circumstantial evidence
5 from which consciousness of guilt or criminal intent may
6 be inferred for it is reasonable to conclude that an
7 innocent person does not ordinarily find it necessary to
8 invent or fabricate an explanation or a statement intending
9 to establish innocence.
10

11 Whether or not evidence as to a defendant's ex-
12 planation or statement points to a consciousness of guilt
13 and the significance, if any, to be attached to any such
14 evidence, however, are matters which are solely for your
15 determination.

16 Your function is to weigh the evidence in this
17 case to determine the guilt or innocence of Mr. Martin,
18 the defendant here, solely upon the basis of the evidence
19 you have heard and the instructions that I have given you
20 on the law.

21 Under your oath as jurors, you cannot and must
22 not allow any consideration of possible punishment, if
23 there is a conviction, to enter into your deliberations
24 or influence your verdict in any way.

25 The duty of imposing sentence is one solely for

the Court.

Each juror is entitled to his or her own opinion and should exchange views with fellow jurors; that is what deliberation is all about. Discuss and consider the evidence. Listen to the arguments of fellow jurors. Present your individual views. Consult with one another and try to reach an agreement based solely and wholly on the evidence, if you can do so without doing violence to your own individual judgment.

Each one of you must decide the case for himself or herself after consideration with your fellow jurors of the evidence in the case.

But you should not hesitate to change an opinion which, after discussion with your fellow jurors, you believe to be erroneous.

However, if after carefully considering all the evidence, the arguments of your fellow jurors, you honestly entertain a view that differs from others, you are not to yield your conviction simply because you are outnumbered or outweighed.

Your final vote must reflect your conscientious belief as to how the issue should be decided.

The charge here is a serious charge and the just determination of this case is important both to the public

and to the defendant.

Under your oath as jurors, you must decide this case as I have said, without fear or favor.

If the Government has failed to carry its burden, your sworn duty is to acquit. If it has carried its burden, you must not flinch from your sworn duty, but must convict.

The guilt or innocence of the defendant, therefore, in the final analysis, is for you and you alone to determine.

Each count must be considered separately, and a separate verdict rendered as to each count.

Your recorded verdict must be unanimous.

Now, that concludes my charge, ladies and gentlemen.

Counsel may wish to confer with me in the robing room if there is any need to do so.

MR. GREENBERG: Just shortly, yes, your Honor.

THE COURT: All right.

(In the robing room.)

MR. GREENBERG: I have just one exception as to your Honor's charge on wilfulness. I think the examples that your Honor gave, destruction of the records, false entries of records, under the circumstances of this case

would not be a proper charge because we have admitted that there was falseness of records within the case and that is part of our defense. But I don't believe that whole line in your charge should have been given.

THE COURT: It seems to me that the jury is free to reject the defendant's story and conclude that the destruction of records is in fact part of his embezzlement scheme and therefore some evidence of wilfulness.

Therefore, I think, should they so conclude, they may use that as a fact in reaching such a conclusion.

So I note your exception.

MR. GREENBERG: Thank you.

MR. WILSON: We have no exceptions, your Honor.

THE COURT: All right.

(In open court.)

THE COURT: Now, Mr. Clerk, would you swear the marshal, and before you do, Mrs. Lempert and Mrs. Sterns, as I was obliged to observe to you at the commencement of the trial, the original twelve jurors being an intact jury, I am at this point required to thank you for your attentive service, but you are excused.

And, Marshal, I suppose they would be permitted to leave the courtroom before the jury-- you are sworn, and the balance of the jury retires. I want to thank you

both for your attention to the Court.

(Two alternates excused.)

(Marshal sworn.)

(Jurors leave the courtroom to deliberate.)

THE COURT: Gentlemen, I am confident that the jury will demand the exhibits so would you kindly assemble all that are in evidence and I would assume that rather than require everybody to attend if a note from the jury comes in asking for these exhibits, it is stipulated that the Clerk may immediately deliver them without judicial intervention?

MR. GREENBERG: Yes, your Honor.

MR. WILSON: Yes.

MR. GREENBERG: One thing further.

Does your Honor have any idea how long you will keep the jury? I assume you will send them home for the evening if they don't--

THE COURT: Well, let's put it this way. I am a reasonable man. Let's see how the afternoon goes.

MR. GREENBERG: All right.,

THE COURT: All right.

(4:30 p.m. recess.)

(6:00 p.m.)

THE COURT: It is my thought, subject to you

gentlemen, that we ascertain from the jury whether they wish to sit further tonight or whether they wish to resume at ten in the morning.

Does anybody have any thoughts to the contrary?

MR. GREENBERG: No, your Honor.

MR. WILSON: No, your Honor.

THE COURT: Marshal, could you bring the jury in and I will inquire of them accordingly.

(Jury enters the courtroom.)

THE COURT: Now, Mr. Foreman, if you would respond only to my questions so that I do not intrude in your function at all, but I wanted to ask you whether it being six o'clock, whether you felt that it was yours and the jury's desire to continue to deliberate at this hour or whether you and the jury would prefer to recess for the evening and resume at ten in the morning?

MR. GREENBERG: I think you ought to add that they could go home if they want to recess, your Honor.

THE COURT: Yes, of course, you will, of course, to to your homes tonight and recess until ten in the morning.

THE FOREMAN: Is there a third choice? That is, to give us more time?

THE COURT: If you wish to continue to deliberate

at this hour, that is your privilege. That was my first suggestion. If you felt it would be fruitful to continue to deliberate, then I would, of course, be delighted to oblige you.

THE FOREMAN: Can you give us a time frame? Like you know, are you saying that if we can expect at this time to reach a decision within an hour or two?

THE COURT: Well, if you thought that you could conclude your function, say, within an hour or an hour and a half, is that something that you gentlemen would feel is appropriate and the jury feels is appropriate? Then I would think that is something, if you wanted to do it that way, that it is your prerogative.

I take it you feel you would like to continue deliberating at this point.

Did you want to retire and talk with your colleagues?

THE FOREMAN: I think so, yes.

THE COURT: And reach a determination? In other words, you can continue to deliberate and we will attend upon you even well into the evening, if that is your desire.

THE FOREMAN: Let us take a vote first.

THE COURT: By all means.

(Jury leaves.)

MR. WILSON: Your Honor, I wonder if we should have told them if they stayed tonight, they get fed.

THE COURT: Well, I think they understand that.

(Jury enters the courtroom.)

THE COURT: Mr. Foreman, with all of the jurors in the room, I didn't want there to be any thought on your part that any time limit was being placed upon you in any way in any decision that you make.

So I trust that that was understood.

THE FOREMAN: Yes.

In view of that, your Honor, we decided unanimously we would not want to add any time pressure by committing ourselves to do it at any hour tonight, so we will convene tomorrow at ten.

THE COURT: All right. Then, ladies and gentlemen, you are excused until ten in the morning and you will go directly to the jury room at that time and continue your deliberations at ten o'clock in the morning.

Now, needless to say, you are in your specific phase of this trial and therefore it is imperative that you continue to heed my admonition not to talk about this case with anyone else, do not talk about this case with anyone else until you are all together again tomorrow and

then you shall resume your deliberations.

All right. Good night, and thank you very much.

(Jury leaves at 6:05 p.m.)

THE COURT: May the record show that Court's Exhibit A is a note that was received from the jury at 5:15 asking the Clerk for the tax returns and a copy of the indictment, all of which was furnished in accordance with the stipulation.

(Court Exhibit A marked.)

THE COURT: All right, gentlemen, you shall be available at ten in the morning.

I am going to start picking a jury in another case.

MR. GREENBERG: Your Honor, I just have another sentence before Judge Stewart at ten but I will be here and check in and I am sure I will be available whenever needed.

THE COURT: Before Judge Stewart, in any event, is that right?

MR. GREENBERG: Yes, your Honor.

MR. WILSON: We don't have to check in here. We will just be available by phone.

THE COURT: Just be available. That's right.

(Adjourned to 10:00 a.m. October 1, 1974.)

Form **1040****U.S. Individual Income Tax Return**

U.S. Treasury Department, Internal Revenue Service

for the year January 1-December 31, 1967,

**1967**

or other taxable year beginning 1967, ending 19

First name and initial (if joint return, use first names and middle initials of both)

Last name

Your social security number

James & MURIEL

MARTIN

048 03 1031

Home address (Number and street or rural route)

3929 CARPENTER AVENUE

Your occupation

Bookkeeper

City, town, or post office, and State

BRONX

NEW YORK

ZIP code

Spouse's social security number

061 16 5831

Enter below name and address used on your return for 1966 (if same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1966 names and addresses.

Your present employer and address

St. Ignace Home - N.Y.C.

Spouse's occupation

Housewife

Spouse's present employer and address, if joint return

Your Filing Status—check only one:1a ☐ Single1b ☐ Married filing joint return (even if only one had income)1c ☐ Married filing separately. If spouse is also filing a return, enter her (his) social security number in space provided above and give first name here1d ☐ Unmarried Head of Household1e ☐ Surviving widow(er) with dependent child**Your Exemptions** Regular 65 or over Blind2a Yourself ☒ ☐ ☐ Enter number of boxes checked 22b Spouse ☒ ☐ ☐

3a First names of your dependent children who lived with you James C. Gerald H. Martin

3b Number of other dependents (from page 2, Part I, line 3) 4

4 Total exemptions claimed 6

Income

If joint return include all income of both husband and wife

Find tax from table OR

Figure tax using tax rate schedules

5 Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation

6 Other income (from page 2, Part II, line 8)

7 Total (add lines 5 and 6)

8 Adjustments to income (from page 2, Part III, line 5)

9 Total income (subtract line 8 from line 7)

10 If you do not itemize deductions and line 9 is less than \$5,000, find your tax from tables in instructions. Do not use lines 11a, b, c, or d. Enter tax on line 12.

11a If you itemize deductions, enter total from page 2, Part IV, line 17. If you do not itemize deductions, and line 9 is \$5,000 or more enter the larger of: (1) 10 percent of line 9; OR (2) \$200 (\$100 if married and filing separate return) plus \$100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to \$1,000 (\$500 if married and filing separately).

11b Subtract line 11a from line 9

11c Multiply total number of exemptions on line 4, above, by \$600

11d Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12.

12 Tax (from either Tax Table, see line 10, or Tax Rate Schedule, see lines 11a-11d)

13 Total credits (from page 2, Part V, line 4)

14a Income tax (subtract line 13 from line 12)

14b Tax from recomputing prior year investment credit (attach statement)

15 Self-employment tax (Schedule C-3 or F-1)

16 Total tax (add lines 14a, 14b, and 15)

17 Total Federal income tax withheld (attach Forms W-2)

18 Excess F.I.C.A. tax withheld (two or more employers—see page 5 of instr.)

19 ☐ Nonhighway Federal gasoline tax—Form 4136, ☐ Reg. Inv.—Form 2439

20 1967 Estimated tax payments (include 1966 overpayment allowed as a credit)

21 Total (add lines 17, 18, 19, and 20)

22 If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return

23 If payments (line 21) are larger than tax (line 16), enter Overpayment

24 Amount of line 23 you wish credited to 1968 Estimated Tax

25 Subtract line 24 from line 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☐ Refund only

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here

James C. Martin

Muriel J. Martin

Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Signature of preparer other than taxpayer

Date

Address

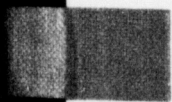
659-10-79329-1

Please attach Copy B of Form W-2 here

Your Tax, Credits, and Payments

Balance Due or Refund

Sign here



Certificate of Service

Feb 5, 19 75

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Paul G. Gensberg